

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-1438

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77-1438

UNITED STATES OF AMERICA,

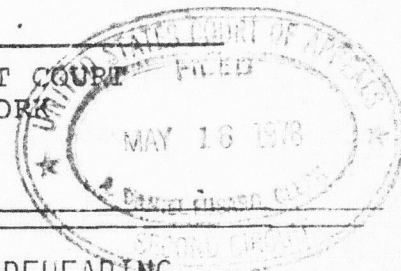
Appellee,

v.

RUSSELL BUFALINO,
MICHAEL SPARBER and
HERBERT JACOBS,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



DEFENDANT-APPELLANT SPARBER'S PETITION FOR REHEARING
AND SUGGESTION OF REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,	:
Appellee,	:
v.	: Docket No. 77-1438
RUSSELL BUFALINO,	:
MICHAEL SPARBER and	:
HERBERT JACOBS,	:
Defendants-Appellants.	:

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DEFENDANT-APPELLANT SPARBER'S
PETITION FOR REHEARING
AND SUGGESTION OF REHEARING EN BANC

Defendant-Appellant Michael Sparber respectfully petitions this Court for a rehearing with respect to the Panel's May 2, 1978 decision, affirming a judgment of conviction entered on October 21, 1977. We respectfully submit that the Panel's decision is contrary to this Court's decision in United States v. Miranda, 526 F.2d 1319 (2 Cir. 1975), cert. denied, 429 U.S. 821 (1976) and is contrary to the decisions of other Circuit Courts of Appeal.

This petition raises questions of exceptional importance concerning the appropriateness of sanctions for the Government's deliberate destruction of Rule 16 and Jencks Act statements, and whether defendants should have been granted the limited hearing requested to inquire as to the jury's prejudicial association of third party contacts

with the defendants and the "matter pending before the jury". Accordingly, we suggest that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this and other Courts and to consider on the merits these exceptional questions.

I. THE ISSUES PRESENTED FOR REHEARING

1. Should sanctions be imposed because of the F.B.I. Case Agent's deliberate destruction of the Kel tapes?
2. Should the indictment have been dismissed, or a mistrial declared for lack of a fair trial because of jury prejudice? And, should defendants have been granted the limited hearing requested below to inquire as to the jury's prejudicial association of the third party contacts with the defendants and the "matter pending before the jury"?
3. Should a mistrial have been declared or the jury instructed to disregard evidence admitted against Sparber on a conspiracy theory prior to the time when Napoli's diamond swindle gave rise to a claim "accruing to the benefit of Jacobs, to which Napoli at least paid lip service"?
4. Should the indictment have been dismissed, or the case remanded, for failure of the Government to satisfy Brady as to the investigation which resulted in the exculpatory evidence that caused the nolle of Lapadura? And did the Court commit reversible error (a) in excluding the Government's admission that "further investigation has

demonstrated that a successful prosecution of JOSEPH LAPADURA is not possible," (b) in allowing Napoli to testify as to Lapadura's statements (on the District Court's ruling that Lapadura could be viewed as an indicted co-conspirator), (c) in precluding cross-examination of Napoli to establish that he testified against Lapadura before the grand jury that indicted Lapadura, and (d) in rejecting our offer of proof that the Government's nolle of Lapadura was in effect an admission that it could not successfully prosecute a case that rested solely on Napoli's uncorroborated testimony?

II. ARGUMENT

- A. The Sanctions For The Government's Deliberate Destruction Of Evidence, Approved By This Court In *Miranda*, Should Have Been Applied In This Case To Dismiss The Indictment Or To Suppress Evidence Because Of The F.B.I.'s Deliberate Destruction Of The Kel Tapes

We submit that the sanctions for the Government's deliberate destruction of evidence approved by this Court in United States v. *Miranda*, supra, 526 F.2d at 1328 should have been applied in this case to dismiss the indictment or suppress evidence because of the F.B.I.'s deliberate destruction of the Kel tapes.

Miranda was a case in which sanctions were not imposed because, unlike here, the destruction of Jencks Act statements was not deliberate (526 F.2d at 1328):

"[T]his is not a case of intentional, deliberate ... loss ... of evidence by government agents in which prophylactic sanctions against the Government would be appropriate. The loss of the tape recording by the agents was merely inadvertent or negligent."

In the present case there is no dispute that the destruction of the Kel tapes by the F.B.I. was deliberate (Opinion pp. 2865-66). Nor is there any question that the Kel tapes included Rule 16 and Jencks Act statements (Opinion, pp. 3864-65). However, rather than imposing sanctions, the Panel merely reiterated this Court's prior warnings as to the destruction of such statements (Opinion, p. 2866).

We respectfully submit that the mere repetition of this Court's previously expressed and already clear warnings is inappropriate, insufficient, and prejudicial to defendant-appellant Sparber. It discounts the F.B.I.'s failure to accede to the clear and prior established rules of law of this Circuit. E.g., United States v. Miranda, *supra*, 526 F.2d at 1328; United States v. Hilton, 521 F.2d 164, 166 (2 Cir. 1975); see PROVING FEDERAL CRIMES, p. 26 (6th Ed. 1976). It ignores numerous prior decisions of Courts of Appeal for other Circuits, which have criticized Governmental destruction of evidence, forewarned the Government of sanctions for this destruction, and imposed sanctions as the consequence of such deliberate destruction. United States v. Carrasco, 537 F.2d 372, 376 (9 Cir. 1976); United States v. Bryant, 448 F.2d 1182, 1184 (D.C.Cir. 1971) (Bryant II); Lee v. United States, 368 F.2d 834, 837-38 (D.C. Cir. 1966); and United States v. Lonardo, 350 F.2d 523, 529 (6 Cir. 1965).

Further, it is reasonable to assume that Special Agent Edwards, an agent of some seven years experience, was fully aware of these prior criticisms, warnings and sanctions at the time that he deliberately destroyed the Kel tapes.* This constitutes a reckless disregard of these judicial standards for the preservation of evidence and mandates sanctions, not merely more warnings.

We submit that in this case such sanctions require either a dismissal of the indictment or, in the alternative, remand with a direction that Napoli's testimony as to the recorded conversations with the defendants, as well as the Nagra recordings of these conversations, be suppressed unless the Government can satisfy the heavy burden of demonstrating that no prejudice resulted to the defendants from the destruction of the tapes (Opinion, pp. 2866-67).

On the present record, the Government has not met this burden. It has not shown that the destroyed tapes were not "merely material or favorable to the defense." For example, the Government expert, Ginsberg, did not even attempt to assess the relative audibility, etc. of the Nagra recordings of April 16 and 20 with the SK8 suitcase recordings of the Kel transmissions on those days (Sparber's Brief on Appeal, pp. 10-11). The failure of the Government to bear its heavy burden on these specific Kel tapes adversely

* We were unable to establish conclusively Agent Edwards' prior knowledge because of Judge Lasker's curtailment of our cross-examination on this point (Hearing, May 9, 1977, Tr. 118-20).

infects any attempt to rely on the District Court's findings that the back-up recordings were "largely inaudible" and "exceedingly inferior" in quality to the Nagra tapes for the proposition that the Government has met its burden (Opinion, p. 2867). Moreover, Judge Lasker's finding that "it cannot be said with certainty that there were no portions of the conversations audibly recorded through the use of the Kel machine which were inaudible on the Nagra tapes" points up that the unwarranted destruction "might have hampered" the defense (Opinion, p. 2865).

- B. The Indictment Should Have Been Dismissed Or A Mistrial Declared For Lack Of A Fair Trial Because Of Jury Prejudice And The Defendants Should Have Been Granted A Limited Hearing To Inquire If The Jury Associated The Third Party Contacts With The Defendants And The "Matter Pending Before The Jury"

We submit that Judge Lasker erred in denying our repeated motions for a mistrial and in denying our request to examine the alternate jurors in the Court's presence after the alternates had been dismissed but prior to the jury's verdict -- so that we could confirm that, like Judge Lasker, the jury associated the third party contacts with the defendants. Further, we submit that the Panel erred in applying the standards of United States v. Brasco, 516 F.2d 815 (2 Cir.), cert. denied, 423 U.S. 860 (1975), a case where jury contact did not relate to a matter pending before the jury, to this case where Judge Lasker denied to us the

very opportunity to inquire of the jurors as to their view of the relation between the contacts and the defendants on trial before them.*

At issue here are rebuffed efforts to start conversations [Tr. 232, 236, 238], glares [Tr. 227], laughs, attempts to intimidate [Tr. 236-37], and repeated contacts in the vicinity of the courthouse [Tr. 232, 236, 238]. At least some of the jurors were "unnerved" by the spectators [Tr. 242-43]. Moreover, Judge Lasker expressed his personal observation that he associated the offending spectators with defendant Bufalino [Tr. 251-52].

We, however, were denied the opportunity to voir dire the alternates to confirm Judge Lasker's observations in two specific areas: first, what did the forelady tell the jurors and what did the jurors say among themselves concerning the spectators' actions; and, second, did anybody say anything that would associate the spectators' activities that were complained about with one or more of the defendants [Tr. 1018-20]?

The requested limited examination was calculated not to interfere with the jurors' deliberations, or in any way exacerbate their apprehensions during the trial. Accordingly, our request was made after the regular jurors had begun their deliberations. They would never know of the

* The appropriate standard, we submit, is that enunciated in Remmer v. United States, 347 U.S. 227, 229 (1954).

voir dire if it proved that the jury did not associate the conduct of the offending spectators with the defendants on trial. The demands on the time of the alternate jurors and the Court would have been minimal, particularly when compared with the fundamental nature of the defendants' right to a fair trial.

There is some suggestion in the Panel's opinion that our request for such a hearing was untimely.* Therefore, we point out that this is not a case where defendants waited for a verdict before asserting their right to a hearing. Instead, the request was purposely proffered so as to effect the least disruption of the trial process, a more serious disruption would have been unwarranted given the uncertainty of the juror's association between the spectators and their conduct and the defendants (because, as we pointed out below, Judge Lasker did not inquire as to this subject). It cannot be said that we were untimely in any respect. We moved for a mistrial on August 5, the first trial day after our review of the transcript of Judge Lasker's in camera voir dire [Tr. 709-10]. And we requested the right to examine the two alternate jurors on August 10, the next full trial day after August 5 [Tr. 1012-13].**

* Opinion, p. 2869 n.7.

** On Monday, August 8, Court was in session for a total of 50 minutes, due to the absence of Mr. Sparber on account of illness, and the jury was not even convened on August 9, due to Judge Lasker's attendance at a judicial conference in Chicago.

Our request for this limited hearing, we submit, should have been granted. United States v. Gersh, 328 F.2d 460, 464 (2 Cir. 1964):

"Save when the conceded facts as to outside contact with a juror conclusively show prejudice, the court is not bound to order a new trial but rather to conduct a hearing in which the facts can be established, with the Government having the burden of showing that any such contact 'was harmless to the defendant'. Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), 350 U.S. 377; 76 S.Ct. 425, 100 L.Ed. 435 (1956); Wheaton v. United States, 133 F.2d 522 (8 Cir. 1943). If a request for such a hearing had been made, it should have been granted." (Emphasis supplied)

The denial of the hearing precluded us from confirming that the jurors, like Judge Lasker, associated the spectators and their "unnerving" behavior with the defendants, whose guilt or innocence to charges that they threatened or unnerved Jack Napoli and his wife through "conversations, attempts to intimidate, and repeated contacts" to collect an extension of credit was then pending before them.

This failure to permit the requested hearing was even more damaging to the defendants' right to trial by an impartial jury given the other prejudicial events which transpired during the course of trial. For example, for the purported purpose of identifying Bufalino's voice, F.B.I. Agent Moody was allowed to testify as to his several conversations with Bufalino starting in 1973 (see citations collected at p. 21 of Defendant-Appellant Sparber's Brief on Appeal). And the Government was allowed to have Napoli testify, over our objections and motion for a mistrial, that he was "relocated"

(from California) because of anonymous death threats [Tr. 679-811].* These events and the general tone of the trial could well have convinced the jury that the spectators' conduct and efforts toward them were directly organized by and attributable to the defendants and not merely incidents that "can be expected occasionally" at any public trial (Opinion, p. 2870).

In summary, we respectfully submit that the denial of our requested hearing precluded us from even exploring the jury's view of the third party contacts and its relation to the matter pending before them. Given the form of these contacts, only such an inquiry would permit an informed decision as to the possible prejudice to the defendants, whether the matter is controlled by Remmer (prejudice presumed) or by Brasco (burden of showing prejudice on the defendant).

C. A Mistrial Should Have Been Declared, Or The Jury Instructed To Disregard Evidence Admitted Against Sparber On A Conspiracy Theory, Until Napoli's Diamond Swindle Gave Rise To A Claim "Accruing To The Benefit Of Jacobs To Which Napoli At Least Paid Lip Service"

We submit that a mistrial should have been declared, or the jury instructed to disregard evidence admitted against Sparber on a conspiracy theory, until Napoli's diamond

* The Government had begun its opening statement by characterizing the case as "a deliberate and organized conspiracy..." [Tr. 4].

swindle gave rise to a claim "accruing to the benefit of Jacobs to which Napoli at least paid lip service."

The Panel affirmed Judge Lasker's refusal to dismiss the indictment for failure to state a crime since there was no "extension of credit", (Opinion, p. 2871):

"Napoli's diamond swindle certainly gave rise to a claim [18 U.S.C. § 891(1)], accruing to the benefit of Jacobs, to which Napoli at least paid lip service."

Prior to Napoli's acknowledgement, albeit lip service only, giving rise to a claim accruing to the benefit of Jacobs, no actions by Sparber can be said to have been directed to the collection or attempted collection of an "extension of credit". Therefore, any early efforts are wholly outside of the proscription of 18 U.S.C. § 894 as a matter of law. More importantly, no evidence, particularly hearsay statements of others, should have been admitted against Sparber on a conspiracy theory during this initial period.

We submit that Judge Lasker erred in failing to grant our motion to strike all such evidence of events that transpired before Napoli's acknowledgement giving rise to a claim [Tr. 718-19]. As a result evidence and damaging hearsay statements of others were improperly considered by the jury in assessing the guilt of Mr. Sparber. We submit that the case should be remanded with instructions to strike all such evidence, particularly hearsay conversations prior to Napoli's purported acknowledgement giving rise to a claim.

- D. The Indictment Should Have Been Dismissed Or The Case Remanded For Failure Of The Government To Satisfy Brady As To The Investigation Which Resulted In The Nolle Of Lapadura And For Other Errors Committed By The Court With Respect To The Nolle Of Lapadura

The Panel's opinion does not discuss our contention that Judge Lasker committed reversible error with respect to the nolle of Lapadura. We respectfully request rehearing.

First, we submit that Judge Lasker erred when he declined to order the Government to produce, as Brady material, the results of the "further investigation" which led the Government to conclude that a prosecution of the indicted co-conspirator, Lapadura, was impossible. We have every reason to believe that the results of such an investigation would have been of critical importance to the credibility of the Government's principal witness, Jack Napoli.

(Defendant-Appellant Sparber's Brief on Appeal, pp. 12-13, 18-19). We submit that such material could have been used to substantially impeach Napoli's credibility and thus should have been produced as Brady material. Giles v. Maryland, 386 U.S. 66 (2 Cir. 1967).

Second, we submit that Judge Lasker erred when he allowed Napoli to testify to hearsay declarations of Lapadura, on the theory that Lapadura was an unindicted co-conspirator. The Government had stated in its Bill of Particulars that there were no unindicted co-conspirators, and the nolle of Lapadura precluded any fair characterization

of Lapadura as an unindicted co-conspirator -- particularly when the Government had admitted that a prosecution of Lapadura for the conspiracy was not possible.

Third, we submit that Judge Lasker erred when he refused at trial to allow proof as to the Government's admission with respect to the impossibility of prosecuting Lapadura and when he excluded our offer of proof that the Government nolleed the case against Lapadura because of the Government's conclusion that Napoli's testimony against Lapadura would be incredible if uncorroborated.

It was not until the Government filed its brief in this appeal that it admitted that the case against Lapadura had been nolleed because the Government decided not to proceed with a case resting on Napoli's uncorroborated testimony (Government Brief on Appeal, p. 48). This admission bears directly on the Government's view of the credibility of its chief witness and confirms our offer of proof, below. The jury should have been allowed to consider this telling admission when assessing the credibility of Jack Napoli.

III. CONCLUSION

For the reasons urged above, Sparber submits that this petition for rehearing should be granted, his conviction reversed, the verdict vacated, and the indictment dismissed. In the alternative, Sparber requests that a new trial be granted and that all evidence with respect to the recorded meetings of April 12, 16 and 20 be suppressed.

Respectfully submitted,

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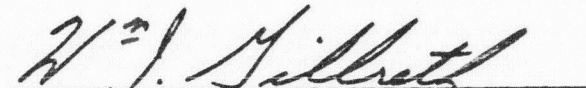
Attorney for Defendant-Appellant
Michael Sparber

OF COUNSEL:

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New York, New York 10017
Telephone: (212) 826-1050

CERTIFICATE

I certify that the above Petition is presented
in good faith and not for purposes of delay.


WILLIAM J. GILBRETH

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - x
UNITED STATES OF AMERICA, :
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v. : Docket No. 77-1438
RUSSELL BUFALINO, :
MICHAEL SPARBER and :
HERBERT JACOBS, :
Defendants-Appellants. :
- - - - - x

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

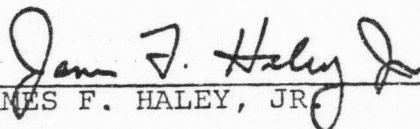
JAMES F. HALEY, JR., being duly sworn, deposes and
says:

THAT he is not a party to this action, is over 21
years of age, and resides at 517 East 87th Street, New York,
New York 10028; and

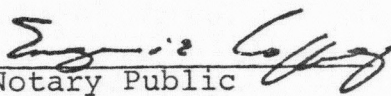
THAT on the 15th day of May 1978 he served copies of
Defendant-Appellant Michael Sparber's Petition For Rehearing
And Suggestion Of Rehearing En Banc upon:

BARBARA S. JONES, ESQ.
Assistant United States Attorney
Southern District of New York
One St. Andrew's Plaza - Eighth Floor
New York, New York 10007

by depositing true copies of same, enclosed in a postpaid wrapper addressed as set forth above, in an official depository for United States mail matter.


JAMES F. HALEY, JR.

Subscribed and sworn to
before me this 15th day
of May, 1978.


Notary Public

EUGENIE COFFEY
Notary Public, State of New York
No. 31-5731875
Qualified in New York County
Commission Expires March 30, 1980

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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) ss.:
COUNTY OF NEW YORK)

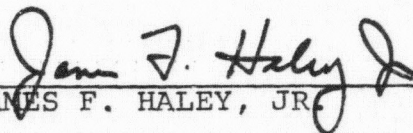
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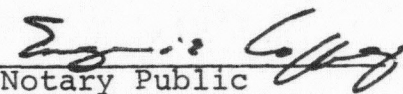
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BARBARA S. JONES, ESQ.
Assistant United States Attorney
Southern District of New York
One St. Andrew's Plaza - Eighth Floor
New York, New York 10007

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JAMES F. HALEY, JR.

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before me this 15th day
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Notary Public

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Notary Public, State of New York
No. 31-5731875
Qualified in New York County
Commission Expires March 30, 1980

